90-246

No.

In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA,

Respondent,

vs.

JAMES K. DORRIS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the verdict in favor of the Petitioner as to the original tax returns of 1982 and 1983 and against the Petitioner as to the amended tax returns for 1981, 1982 and 1983 was inconsistent and against the weight of the evidence.

II. Whether the Trial Court erred in allowing the Government to argue that the Petitioner's Universal Life Church Congregation was a sham organization.

III. Whether the Trial Court erred in denying, without an evidentiary hearing, the Petitioner's Motion to Dismiss the Indictment on the basis of selective prosecution.

IV. Whether the Trial Court erred in failing to dismiss Count Three of the Superseding Indictment (1981 Amended Tax Return).

V. Whether the tax sections which the Government claims to be applicable to the prosecution are unconstitutionally vague to support a criminal conviction.

VI. Whether the Government's solicitation of testimony from the IRS agent that the Petitioner failed to contract Agent Bell or to produce records following Agent Bell's interview of Petitioner on July 5, 1984 constituted reversible error.

VII. Whether the Trial Court erred in charging the Jury that the statements made in the amended returns in Counts 3, 4, and 5 were material as a matter of law.

PARTIES TO THE PROCEEDINGS

The Caption of the case contains the names of the parties to the proceeding in this Court. The Petitioner's wife, Patricia Dorris, was co-defendant at trial and was acquitted.

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A copy of the judgment and commitment Order of the United States District Court for the Eastern District of Pennsylvania (criminal no. 89-00092-01) dated October 19, 1989 is attached to the appendix. The Orders from the United States Court of Appeals from the Third Circuit dated April 10, 1990 affirming the judgment of the Lower Court and dated May 7, 1990 denying the Petition for Rehearing In Banc are also attached to the appendix.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on April 10, 1990. A Petition for Rehearing In Banc was denied by Order dated May 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Arguments include the rights afforded by the First, Fifth and Sixth Amendments.

STATEMENT OF THE CASE[1]

This is a Petition for Certiorari arising from the following facts. In or about March, 1989, the Petitioner and his wife, Patricia A. Dorris, were charged in a five count indictment for alleged tax violations [26 U.S.C. Section 7206 (1)]. On or about August 22, 1989, the Government returned a superseding indictment which essentially charged the same five violations. Said Counts charged that the Petitioner and his wife claimed deductions for certain charitable contributions as follows:

COUNT	DATE	TAX RETURN	AMOUNT
I	4/17/83	1982	$11,400.00
II	4/15/84	1983	$11,050.00
III	1/08/85	1981 (Amended)	$14,034.00
IV	2/27/85	1982 (Amended)	$11,400.00
V	1/03/85	1983 (Amended)	$11,050.00

1. "Tr" will refer to the trial transcripts.

On September 5, 1989, a jury trial commenced and evidence was concluded on Friday, September 8, 1989. Following closing arguments and the Court's charge on September 13, 1989, the jury returned a verdict of not guilty as to all counts for Patricia Dorris and a verdict of guilty as to Counts III, IV and V and not guilty as to Count I and II as to James K. Dorris.

On October 19, 1989, Mr. Dorris was sentenced as to Count III for a period of imprisonment of 90 days, as to Count IV to pay a fine of $9,000.00 and as to Count V to a three year period of probation with a three hundred hour community service requirement. The commencement of sentencing was stayed pending this appeal (6a).

On April 10, 1990 a Judgment Order was issued by the United States Court of Appeals for the Third Circuit wherein the judgment of the Lower Court was affirmed (3a). The Petitioner presented a Petition for Rehearing In Banc to the United States Court of Appeals for the Third Circuit which was denied on May 7, 1990 (3a).

STATEMENT OF FACTS

James K. Dorris and his wife, Patricia, have been married for over thirty years and have four children (9/8/89 Tr. 45). From approximately 1969 to 1989, Mr. Dorris worked for the FAA as an air traffic controller. Because of that position he was required to relocate to various states periodically (9/8/89 Tr. 49-51).

Mr. Dorris is from a Protestant background and his wife is from a Catholic background. Their different religious backgrounds was a matter of some conflict between the Dorrises at various times during their married life. Furthermore, Mr. Dorris was searching to become involved in some type of ministry (9/8/89 Tr. 52, 154-159).

In approximately 1979, Mr. Dorris was transferred to Bethany, Oklahoma. While in Bethany, Mr. Dorris spoke with a Mormon minister, George Harris, concerning his ministry and Mr. Dorris' desire to become involved in a ministry (9/8/89 Tr. 13-16, 55). Thereafter, in speaking with another FAA employee, Terry Rhodes, Mr. Dorris learned of the Universal Life Church (ULC). Mr. Rhodes was a minister in the ULC. After doing some research and making certain inquiries, Mr. Dorris decided that he wished to join the ULC and to become a minister.[2]

When Mrs. Dorris and the children moved to Oklahoma some time thereafter, Mr. Dorris reviewed with his wife what he knew of the ULC and his desire to become a minister in the Church. Mrs. Dorris' own research of the ULC consisted of contacting the Internal Revenue Service (IRS) to ascertain the IRS's position with regard to the ULC. Mrs. Dorris was advised by the IRS representative that the ULC was a recognized tax exempt religious organization, that a minister could set up a church in his home, and that in order to qualify as a church the IRS required three Board Members (9/8/89 Tr. 57, 159-163).

Mrs. Dorris agreed to support her husband in this ministry and Mr. Dorris subsequently became a licensed ordained minister of the ULC in July, 1979. James K. Dorris' ministry was an outreach ministry to individuals who were disillusioned with their own religious commitment or lack thereof. Mr. Dorris was not interested in bringing in new members to his congregation; rather, the focus of Mr. Dorris' ministry was to get individuals to go back to their own church or faith in Christ (9/8/89 Tr. 65-67).

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2. Since Mr. Dorris was in the process of pursuing a graduate degree for advancement in the FAA, it was impossible to plan to attend any Seminary. The ULC permitted Mr. Dorris to establish an immediate ministry (9/8/89 Tr. 54).

Mr. Dorris, pursuant to the instructions given him by the ULC headquarters in Modesto, California, established his chartered congregational church (Charter Number 29427) in his home and his periodic services would consist of prayer, bible reading, songs and tape playing (9/8/89 Tr. 67).

From an organizational standpoint, Mr. Dorris and his wife constituted two of the three individuals on the Board of Directors. Other Board Members, at various times, included Terry Rhodes, George Crotts and Ken Morris. Resolutions were approved by the Board and the Church provided the Dorris family with a parsonage allowance pursuant to section 107 of the Internal Revenue Code. The Church had its own separate checking account. In addition to the parsonage allowance, the Church would also reimburse James K. Dorris for operating expenses relating to church activities which had been previously approved by the Board. Mr. Dorris relied upon the guidance of Terry Rhodes and upon the organizational instructions provided by the ULC headquarters in California as to the administration and record keeping process for the chartered congregation (9/8/89 Tr. 58-62).

Any contribution made by Mr. and Mrs. Dorris to their chartered congregation of the ULC was made by personal check and deposited into the Church account. The Church would also, on occasion, provide Mr. and Mrs. Dorris pursuant to approved resolutions with a parsonage allowance and reimbursement for payment of certain operating expenses. Any check received from the Church was deposited into the personal account of Mr. Dorris (9/6/89 Tr. 145-151, 9/7/89 Tr. 6-65). The maintaining of separate checking accounts was not only recommended by the mother Church of the ULC in Modesto, California but was also in keeping with sound accounting principles (9/8/89 Tr. 30-33).

Any monies paid by James K. Dorris to the ULC were declared by him as charitable deductions. The only limitation

imposed upon Mr. Dorris according to the instruction manual from the ULC was that a minister, such as Mr. Dorris, could not be the only one to contribute to his own congregation since that would constitute self dealing. Mr. Dorris was advised that it was permissible for different congregations to support each other (9/8/89 Tr. 63-64, 108-110). On his initial tax returns, Mr. Dorris provided the IRS with copies of his personal checks made payable to his chartered church (See Government's trial Exhibits A and B). The charitable deductions taken by the defendant always specified on the return what amount of money constituted payment to the ULC.

In May, 1981, Mr. Dorris had to relocate to West Virginia. His wife and children again remained behind in Oklahoma. While in West Virginia, the air traffic controllers' strike occurred and Mr. Dorris was transferred in August, 1981, to JFK International Airport in New York. In November, 1981 the family later moved to New York City after selling the house in Oklahoma. In September, 1982 Mr. Dorris was transferred to Philadelphia International Airport. However, because he could not qualify in the allotted short time period, he went back to JFK in January, 1983. His family meanwhile had moved to the King of Prussia area where they stayed. During this time period Mr. Dorris continued, as best he could, his outreach ministry and periodic prayer meetings or services (9/8/89 Tr. 61-81).

In approximately 1983, Mr. Dorris read an article which had been published by the ULC wherein its founder indicated that in his opinion, Christ was a liar. Clearly disagreeing with this philosophy, Mr. Dorris resigned his position effective as of August 1, 1983. After leaving the ULC, Mr. Dorris had several meetings with Tom Avringer, a Baptist minister in New York, concerning the possibility of establishing a ministry in that area (9/8/89 Tr. 80-88).

During the time period that Mr. Dorris had been a member of the ULC, the Universal Life Church, whose base is located in Modesto, California had tax exempt status from approximately 1974 to 1984. Mr. Dorris' resignation was effective as of 8/1/83 and thereafter he had no further contact with the ULC. In 1984, the ULC's tax exempt status was revoked and the revocation was made retroactive (9/6/89 Tr. 108-110). Sylvia Pratt, an IRS employee, testified that between 1974 and 1984 over several thousand people had applied, as did Mr. Dorris, to the ULC for membership (9/6/89 Tr. 122).

In 1979 (Government Exhibit A) and 1980 (Government Exhibit B) Mr. Dorris listed the contributions to the ULC and attached copies of his check payable to the ULC (Congregational Charter 29427). The 1981, 1982 and 1983 tax returns (Government Exhibits 1, 3 and 6 respectively) list those contributions specifically made to the ULC.[3]

Special Agent Jack Bell of the Internal Revenue Service began his investigation of Mr. Dorris in the Spring of 1984. On July 5, 1984, Agent Bell and another, made an unannounced visit to the residence of James K. Dorris and asked to speak with Mr. Dorris about an investigation. The nature of the interview consisted in Agent Bell asking questions and Mr. Dorris responding (Mr. Dorris answered all questions posed to him including, his background, employment with the FAA, moving to different locations, becoming a minister in the ULC, the establishment of Church checking accounts in Oklahoma, New York and Philadelphia as he would move, and his reasons for leaving the ULC [9/7/89 Tr. 90-96]). At one point, Mr. Dorris inquired of Agent Bell directly what Agent Bell felt Mr. Dorris had done wrong. No response was given (9/8/89 Tr. 95-96).

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3. Copies of the 1981, 1982 and 1983 amended tax returns are attached to the Defendant's Post Trial Motions. The appellant will provide copies of any trial exhibits should this Court require.

While the investigation was pending and while Mr. Dorris was waiting to hear from the IRS concerning its investigation, Mr. Dorris filed amended returns. The amendments did not change in any way the claimed charitable deductions in the original tax returns. These amended returns for the years 1981 (Government's Trial Exhibit 2a and 2b), 1982 (Government's Trial Exhibit 5) and 1983 (Government's Trial Exhibit 7) specifically dealt with changes concerning FICA, per diem and earned interest income figures.

ARGUMENT

I.

THE VERDICT IN FAVOR OF THE PETITIONER AS TO THE ORIGINAL TAX RETURNS OF 1982 AND 1983 AND AGAINST THE PETITIONER AS TO THE AMENDED TAX RETURNS FOR 1981, 1982 AND 1983 WAS INCONSISTENT AND AGAINST THE WEIGHT OF THE EVIDENCE.

The test is whether there was substantial evidence for a *rational* jury to find that the government proved all the elements beyond a reasonable doubt. *United States v. Doan*, 710 F.2d 124, 127 (3d Cir. 1983); *United States v. Dixon*, 658 F.2d 181, 188 (3d Cir. 1981); *United States v. Velasquez*, ____ F.2d ____ (3d Cir., No. 88-3652, 9/1/89).

During the course of the trial, the Court intimated that this was not a difficult case in the sense that the jury would conclude either that Mr. Dorris' congregation was a "sham" organization from the beginning or, on the contrary, that Mr. Dorris had established his ULC congregation for religious reasons and that he subsequently declared those charitable deductions to which he truly believed he was entitled. If the former occurred, he would be convicted as to all counts; if the latter then he would be acquitted.

The crime of tax perjury is defined in 26 U.S.C. Section 7206(1) as follows: "any person who . . . willfully makes and subscribes any return . . . which contains or it is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter," shall be guilty of a felony. Clearly the main issue in the case was one of intent, that is whether the Petitioner willfully made and subscribed to a return he did not believe to be true. *See United States v. Doan*, 710 F.2d 124, 126 (3d Cir. 1983).

However, the jury, after deliberating for approximately three hours concluded that the Petitioner was not guilty as to the original tax returns for 1982 and 1983 (Counts 1 and 2) but that he was guilty for the amended tax returns which were filed in 1985 for the tax years of 1981, 1982 and 1983 (Counts 3, 4, and 5).

The jury, by its finding of not guilty as to Counts I and II concluded that Mr. Dorris truly believed at the time he filed his 1040 tax returns for the years 1982 and 1983 that he was entitled to the claimed charitable deductions and that he did not knowingly or willfully make any material misrepresentations on those returns. In short, Mr. Dorris believed that what he was doing was correct. Additionally, the government, over the objection of the Petitioner had introduced evidence that the Respondent had claimed as deductions his contributions which he had made to the ULC for the years 1979, 1980 and 1981. Yet the jury still concluded that there was no criminal intent on Mr. Dorris' part, during the time period that he was a member of the ULC or, to say it another way, that he truly believed he was entitled to the claimed charitable deduction for the tax years of 1982 and 1983.

In 1983, Mr. Dorris voluntarily ended his association with the ULC because of his own religious convictions. As of August 1, 1983, no more contributions were made by him to the ULC.

Almost a year later, on July 5, 1984, Special Agent Jack Bell appeared unannounced at the Dorris residence. Agent Bell stated that he was conducting a criminal investigation and proceeded to ask him numerous questions concerning his association with the ULC. At no time did Agent Bell advise Mr. Dorris what the IRS felt he had done improperly.

Subsequent to the interview and while the investigation was pending, Mr. Dorris filed amended tax returns for the tax years 1981, 1982 and 1983 (Government Exhibits 2a & b, 5 and 7). These amended returns were necessary in order to make the appropriate changes concerning FICA, per diem and earned interest income figures. Mr. Dorris paid additional income tax because of the changed items. *The amended tax returns did not change in any way the claimed charitable deductions in the original tax returns.* The same figures pertaining to the deductions were merely copied on the amended returns (9/6/89 Tr. 58-71). Mr. "Dorris literally could do nothing about his claimed charitable deductions while the investigation (which took five years) was pending especially in light of Mr. Dorris' belief that the claimed charitable deductions had been appropriate and permissible.

The Petitioner is mindful that as a general rule a jury may reach inconsistent verdicts with respect to a single defendant in a criminal case. *United States v. Powell*, 469 U.S. 57, 60-69 (1984). However, this Court in *Powell* left open the possibility that a certain case may warrant a dismissal in light of its inconsistent verdict and its lack of sufficient credible evidence. In the present case, where the actions of the jury are clearly explainable and the evidence was insufficient to support a finding of guilt as to Counts 3, 4 and 5, justice would warrant that the verdict be set aside and that a judgment of acquittal be granted.

During closing arguments, the prosecutor for the first time, on rebuttal, called the jury's attention to the fact that amended

income tax returns had been filed by Mr. Dorris following the July 5, 1984 interview by Agent Bell (9/13/89 Tr. 89). Nothing was mentioned by the prosecutor as to the substance of the amended tax returns. Since this was rebuttal, the defense was precluded from calling to the jury's attention the fact that the amended returns did not change or modify the charitable deductions which had previously been taken on the original returns. Since arguments were occurring five days after the closing of evidence, it is obvious that the jury never considered the substance of the amended returns.

Clearly the Petitioner who believed that the charitable deductions which he claimed in the original returns were true and correct, cannot be faulted, let alone found guilty beyond a reasonable doubt, for filing amended tax returns to clear up matters other than the charitable deductions while the criminal investigation was continuing. The critical element of tax fraud is the mental state of the defendant. *United States v. Sternstein*, 596 F.2d 528 (2nd Cir. 1979).

The Petitioner believed in the trueness and correctness of his tax returns for 1979 through 1983 and that belief did not change for the amended returns. Having been found not guilty as to Counts 1 and 2, the only logical result should have been not guilty as to Counts 3, 4 and 5.

As is apparent by the jury's verdict as to Counts 1 and 2, the Petitioner believed the claimed deductions were true and correct originally. There was no reason to change those figures on the amended tax returns. The only thing that Mr. Dorris was aware of was that the IRS was investigating the ULC. No deductions had been denied by the IRS; nor had the IRS suggested to Mr. Dorris any reason which would warrant the denial by the IRS of any deductions.

Certainly there was no duty placed upon Mr. Dorris to amend the tax returns with respect to the previously claimed charitable deductions just because he was aware of a pending IRS investigation. In *United States v. Pomponio*, 429 U.S. 10 (1976), rehearing denied 429 U.S. 987, on remand 563 F.2d 659, certiorari denied 435 U.S. 942, "willfulness" was defined as simply meaning a voluntary intentional violation of a known legal duty. In the present case, Mr. Dorris not only believed in the deduction he had previously taken but he also had no other alternative but to await the outcome of the IRS investigation. Were he to make any changes, we submit that the Government would then claim that constituted an admission of guilt. However, he had to file amended tax returns in order to make the appropriate changes with regard to other items.

The evidence fails to demonstrate that Mr. Dorris willfully and knowingly made material misrepresentations in the amended tax returns.

II.

THE TRIAL COURT ERRED IN ALLOWING THE GOVERNMENT TO ARGUE THAT THE PETITIONER'S UNIVERSAL LIFE CHURCH CONGREGATION WAS A SHAM ORGANIZATION.

During the course of the trial, the government suggested that Mr. Dorris violated tax laws in possibly three ways. The first is that while the ULC in Modesto, California had a tax exempt status, the Petitioner's congregation did not. This was at best a technical violation of which he was not aware since he had been told both

by the ULC and the IRS that the defendant's congregation could use the tax exempt status of the ULC.[4]

The second is that the contributions of Mr. Dorris inured to his benefit because it was his congregation. The Petitioner testified he was not aware of this limitation. He was aware that he could not be the only contributor to his congregation since he was advised of this by the ULC in California. The experts for both sides differed as to this opinion. Again this was at best a technical violation. Furthermore the specific part of section 170 of the Code is vague since the section states that no part of the *net earning* may inure to the benefit of an individual. Since the Petitioner received a parsonage allowance and was reimbursed for certain operating expenses, these sums do not constitute net earning. Rather they constitute expenses which are deducted from the gross to ascertain the net earnings.

The third and most important suggestion by the Government is that the Petitioner's congregation was not a viable religious organization despite the fact that the ULC had been granted tax exempt status. Both experts agreed that the Code never defined or limited the idea of a religious organization. Furthermore, Mr. Dorris described his ministry as an outreach ministry and stated that he had periodic services in the nature of prayer, bible reading, singing and listening to tapes. The Government failed to produce any evidence which demonstrated that Mr. Dorris' congregation was anything but a religious organization.

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4. Mr. Dorris even attached to his 1981 amended tax return a letter from the IRS to the Universal Life Church in Modesto, California dated April 13, 1976 wherein the ULC was advised of its tax exempt status. No limitation was mentioned by the IRS. Mr. Dorris was advised by the ULC that his congregation was tax exempt since it was part of the ULC.

The Courts have concluded that most precious of all constitutional rights is that afforded under the First Amendment — the right of religious expression and association. *See United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). Essentially the term "religion" is not defined in the law. The Courts have interpreted "religion" broadly and recognize that serious constitutional difficulties would result if the term were interpreted to exclude even those beliefs that do not encompass a supreme being in the conventional sense.

The defense attempted to seek an affirmation by the Court that the Petitioner's congregation was a religious organization by requesting supplemental points for charge in accordance with *ULC, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974).[5] These requests were denied.

Additionally despite evidence to the contrary, the Government was permitted to argue and/or suggest that the ULC congregation of the Respondent was a "sham" organization. Over the objection of the defense (App. 142a-144a; 9/6/89 Tr. 14-16), the Government was permitted to refer to the method by which Mr. Dorris became a minister, namely by written application and a fee. Such references and comments had no bearing on the tax

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5. In *ULC, Inc. v. U.S.*, 372 F. Supp. 770 (E.D. Cal. 1974), the Court reasoned that the ordination of ministers and the chartering of churches were fully accepted activities of a religious organization. The fact that the ULC distributed minsters' credentials may be compared to a mass conversion at a typical revival or religious crusade. Neither the Federal Courts, nor any branch of the Government may properly consider the merits or fallacies of a religion. Nor will the Court compare the belief, dogmas and practices of a newly organized religion with those of older more traditional or established religions. Nor will the Court praise or condemn a religion, however excellent or unusual it may seem. Were this to be done, it would violate the guarantee of the First Amendment Freedom of Religion.

case, but rather was an attempt to suggest that Mr. Dorris' ULC congregation was not a religious organization. This violated the defendant's First Amendment right, and was contrary to the weight of the evidence.

Since the Government was permitted to argue against the religious organization of the ULC congregation of the Respondent, the verdict must be set aside. See *Yates v. United States*, 354 U.S. 298, 312 (1957) ("A verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected").

III.

THE TRIAL COURT ERRED IN DENYING, WITHOUT AN EVIDENTIARY HEARING, THE PETITIONER'S MOTION TO DISMISS THE INDICTMENT ON THE BASIS OF SELECTIVE PROSECUTION.

The standard for review is whether the Trial Court erred in denying, without an evidentiary hearing, the Petitioner's motion to dismiss the indictment on the basis of selective prosecution. We respectfully submit that the evidence demonstrates a systematic discrimination on the part of the Government in its enforcement as well as an unjust discrimination between Mr. Dorris and others in similar circumstances.

The gist of the Government's case against Mr. Dorris was that he declared certain charitable contributions which were made to the Universal Life Church as deductions. The United States challenged the legitimacy of these charitable contributions and charged the defendant with knowingly and intentionally violating 26 U.S.C. Section 7206(1).

The Internal Revenue Service of the United States of America has had a long history of dealing with the Universal Life Church. The Internal Revenue Service, on or about April 13, 1976, recognized the tax exempt status of the Universal Life Church organization under Section 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C. Section 501(c)(3)(1982). On or about August 28, 1984, the Internal Revenue Service issued a letter ruling revoking its prior ruling of April 13, 1976. It is believed that this matter is presently on appeal.

The Internal Revenue Service has taken the position that the Universal Life Church is a tax protester. Furthermore, the Internal Revenue Service has lumped together any member or former member of the Universal Life Church into the category of a "tax protester". Mr. Dorris and his wife were included in this category.

In or about 1983, the Petitioner, James K. Dorris, disassociated himself, for religious reasons, with the Universal Life Church. On or about July 5, 1984, federal agents associated with the Criminal Division of the Internal Revenue Service questioned Mr. Dorris concerning his association with the ULC. The investigation had begun in the spring of 1984.

From 1976 to 1984, over two thousand people, including the Dorris Family, had established a ministry through the ULC (See Trial testimony of Sylvia Pratt, tax law specialist on exempt corporations [9/6/89 Tr. 122]).

The Government is not entirely unconstrained in its choice of those whom it will prosecute. As long ago as *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), Justice Matthews wrote for the Supreme Court that

> "if [a law] is applied and administered by public authority with an evil eye and an unequal hand,

> so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution." [118 U.S. at 373, 6 S.Ct. at 1073]

"Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974). *See also, United States v. Torquato*, 602 F. 2d 564, 568 (3d Cir. 1979), *cert. denied*, 444 U.S. 941, 100 S. Ct. 295, 62 L. Ed. 2d 307.

Recently the Supreme Court reasoned that selectivity in enforcement of criminal laws is subject to constitutional restraints. A decision to prosecute may not be deliberately based upon unjustifiable standards such as race, religion or other arbitrary classification, including the exercise of protected statutory and constitutional rights. *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985).

Most precious of all constitutional rights is that afforded under the First Amendment— the right to religious expression and association, and the mere exercise of that right cannot be punished by means of selective prosecution. *See United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972).

The Third Circuit in *United States v. Torquato* ruled that:

> "although the government is permitted the conscious exercise of some selectivity in the enforcement of its criminal laws, *Oyler v. Boles*,

> 368 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446 (1962), any systematic discrimination in enforcement, [*United States v. Robinson*, 311 F. Supp. 1063, 1065 (W.D. Mo. 1969)], or unjust and illegal discrimination between persons in similar circumstances, *Yick Wo, supra*, 118 U.S. at 374, 6 S. Ct. at 1073, violates the equal protection clause and renders the prosecution invalid." [602 F.2d at 568]

In the present case, the Internal Revenue Service has systematically lumped the Universal Life Church and its members, whether past or present, into the category of a "tax protester". Furthermore, the United States' charges of tax violation for the years 1981, 1982 and 1983 against the Petitioner, after the Internal Revenue Service had revoked the tax exempt status of the Universal Life Church in August, 1984, constitutes, in essence, a form of retroactive prosecution.

Additionally, a review of various cases clearly demonstrates that others who were similarly situated as the Dorris family have not been nor are they generally prosecuted for the same conduct. Numerous tax payers have been assessed civil tax liabilities based upon their alleged contributions to the Universal Life Church. Said tax payers have received "statutory notices of deficiency" from the IRS, asserting additional taxes due upon disallowance of contributions to the ULC. While the IRS has assessed civil "negligence" penalties in most cases, pursuant to Internal Revenue Code Title 26 U.S.C. Section 6653(a), none of these individuals have faced criminal prosecution (Examples of over sixty cases are listed in the Supplemental Memorandum in support of the Pre-trial Motion).

The only member or former member of the ULC to have been called by the Government at trial as a witness was Ken Morris.

Mr. Morris admitted that he filed amended tax returns. Neither civil penalties nor criminal charges were ever brought against Mr. Morris.

It is impossible to establish the total number of cases which have already been tried civilly or which are presently pending in the civil arena absent meaningful discovery. Clearly however, the Respondent has been singled out for his religious affiliation with the ULC. Furthermore Mr. Dorris was criminally prosecuted while others, many others, similarly situated have not been prosecuted.

IV.

THE TRIAL COURT ERRED IN FAILING TO DISMISS COUNT THREE OF THE SUPERSEDING INDICTMENT (1981 AMENDED TAX RETURN).

In or about March, 1989, a Federal Grand Jury returned a five count indictment against James K. Dorris and his wife alleging violations of 26 U.S.C. Section 7206(a). Count 3 refers to the 1981 amended tax return which was filed in January, 1985. The Government did not mention the original 1981 individual tax return which had been filed on or about March 10, 1982.

Count 3 charges that the Respondent improperly deducted charitable contributions in the amount of $14,034.00. Those exact figures had been mentioned in the original 1981 income tax return.

The amended tax return for 1981 did nothing to change the figures either for the deductions or the charitable contributions. The 1981 amended income tax return seeks a reimbursement for FICA payments.

There are no allegations raised by the Government in the indictment nor was any evidence presented at trial which would

suggest that the request for reimbursement of the FICA payments was in and of itself a violation of Title 26 U.S.C. Section 7206(1).

The claim by the Government is that the charitable contributions taken by Mr. Dorris constituted a violation of that section of the United States Code. That charitable contribution was listed in the original 1981 tax return which is well beyond the six year statute of limitations. See 26 U.S.C. Section 6531. It is clear that the six year statute of limitation begins to run on the date that said return becomes due. *United States v. Zudick*, 523 F.2d 848 (3d Cir. 1975); *United States v. Myerson*, 368 F.2d 393, *cert. denied*, 386 U.S. 991, 87 S. Ct. 1305, 18 L. Ed. 2d 335. The 1981 tax return became due on April 15, 1982. This was more than six years from the date of the indictment.

The Government has attempted to pursue the 1981 income tax return by alleging a violation of 26 U.S.C. Section 7206(1) in the amended 1981 return which was filed. However the only change on the amended income tax return was with regard to FICA payments. There was no overt affirmative act taken by Mr. Doris which could arguably be said by the Government to be sufficient to keep the action alive.

V.

THE TAX SECTIONS WHICH THE GOVERNMENT CLAIMS TO BE APPLICABLE TO THE PROSECUTION ARE UNCONSTITUTIONALLY VAGUE AND CANNOT SUPPORT A CRIMINAL CONVICTION.

Section 170 of the Internal Revenue Code allows an individual to take deductions for contributions made to an organization organized and operated exclusively for religious purposes with the specification that no part of the *net earnings* is to inure to the benefit of an individual. Section 501 of the Internal Revenue Code has similar language.

At the conclusion of testimony Petitioner raised various objections including the fact that the tax sections were vague and therefore unenforceable in a criminal setting (9/8/89 Tr. 200-202).

In addition to the Code never defining or limiting the term "religious purposes", it also never defined what was meant by the term "net earnings." Even the Government's expert admitted to the lack of definition. Applying accounting procedures, net earnings constitute the amount remaining once the operating expenses are deducted from the gross receipts.

Since the Petitioner received a parsonage allowance and was reimbursed for certain operating expenses, these sums do not constitute net earning. Rather they constitute expenses which are deducted from the gross to ascertain the net earnings.

While the Government claims that the defendant wilfully violated section 170, a criminal charge cannot stand in light of the vagueness of the terms.

VI.

THE GOVERNMENT'S SOLICITATION OF TESTIMONY FROM THE IRS AGENT THAT THE PETITIONER FAILED TO CONTACT AGENT BELL OR TO PRODUCE RECORDS FOLLOWING AGENT BELL'S INTERVIEW OF MR. DORRIS ON JULY 5, 1984 CONSTITUTED REVERSIBLE ERROR.

On direct examination, the prosecutor inquired of Agent Bell if, following his interview of Mr. Dorris on July 5, 1984, Mr. Dorris had ever made an attempt to contact Agent Bell or to provide Church records. Despite an attempt to object to this inquiry, Agent Bell stated that Mr. Dorris never attempted to contact him or to provide Church records.

At side bar counsel requested a mistrial. the trial court denied the request and further instructed the jury that they were to disregard the testimony. We submit that such testimony was highly prejudicial and constituted reversible error (9/6/89 Tr. 152-158).

The jury, by its verdict, obviously focused on Mr. Dorris' actions following the July 5, 1984 interview with Agent Bell. The prosecutor by her question suggested to the jury that Mr. Dorris by subsequently remaining silent and not producing any records had something to hide. This comment was in violation of Petitioner's Fifth Amendment Right and required a reversal of the conviction. *See Doyle v. Ohio*, 426 U.S. 610 (1976). The prosecutor essentially urged the jury to draw an adverse inference from the Petitioner's exercise of his right. Such action constituted prejudicial error. *United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978); *United States v. Edwards*, 576 F.2d 1152 (5th Cir. 1978).

VII.

THE TRIAL COURT ERRED IN CHARGING THE JURY THAT THE STATEMENTS MADE IN THE AMENDED RETURNS IN COUNTS 3, 4, AND 5 WERE MATERIAL AS A MATTER OF LAW.

The appellant recognizes that the Court, in some instances, may charge that as a matter of law, that certain statements were material. *See United States v. Greenberg*, 735 F.2d 29 (2d Cir. 1984). However in the present case there was a serious question of materiality concerning the amended tax returns. The amended tax returns, as indicated above, did not change or modify the previously claimed charitable deductions. The amended tax returns were filed for reasons other than the charitable deductions. The defendant had a right to have the jury consider the materiality of the statements made in the amended tax returns. The Court's

instruction to the jury essentially constituted a directed verdict for the United States.

CONCLUSION

For the reasons advanced in this Petition, it is respectfully submitted that a Writ of Certiorari should be issued to review the decision of the Court of Appeals below.

Respectfully submitted,

EDWARD J. SCHWABENLAND
Attorney for the Petitioner

APPENDIX A — SUR PETITION FOR REHEARING FROM THE THIRD CIRCUIT DATED MAY 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1914

UNITED STATES OF AMERICA

v.

JAMES K. DORRIS,

Appellant

(D.C. Crim. No. 89-00092-01)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and SEITZ*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

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* As to panel rehearing only.

Appendix A

BY THE COURT,

s/ [illegible] Seitz
Circuit Judge

Dated: May 7, 1990

APPENDIX B — JUDGMENT ORDER FROM THE THIRD CIRCUIT DATED APRIL 3, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1914

UNITED STATES OF AMERICA

v.

JAMES K. DORRIS,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania D.C. Criminal No. 89-00092-01 (Honorable Norma L. Shapiro)

Submitted April 3, 1990

Before: MANSMANN, SCIRICA and SEITZ, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that:

1. The court erred in denying, without an evidentiary hearing, appellant's motion to dismiss the indictment on the basis of selective prosecution;

2. The court erred in denying, without an evidentiary hearing, appellant's motion to dismiss the indictment on the basis of prosecutorial conduct;

Appendix B

3. The court erred in failing to dismiss Count III of the superseding indictment (1981 Amended Tax Return);

4. The court erred in refusing, without an evidentiary hearing, to suppress appellant's statement of July 5, 1984;

5. The verdict as to the appellant was inconsistent and against the weight of the evidence;

6. The evidence was insufficient to demonstrate a finding of guilt beyond a reasonable doubt as to the amended tax returns;

7. The court erred in allowing the government to argue that appellant's Universal Life Church congregation was a sham organization;

8. The tax sections which the government claims to be applicable to the prosecution are unconstitutionally vague and cannot support a criminal conviction;

9. The government's solicitation of testimony from the IRS agent that appellant failed to contact Agent Bell or to produce records following Agent Bell's interview of the appellant on July 5, 1984, constituted reversible error; and

10. The court erred in charging the jury that the statements made in the amended returns in counts III, IV and V were material as a matter of law, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Appendix B

BY THE COURT,

s/ [illegible] Seitz
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mvros, Clerk

April 10, 1990

APPENDIX C — JUDGMENT ORDER DATED OCTOBER 19, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Case Number: 89-92-1

UNITED STATES OF AMERICA

V.

JAMES K. DORRIS
730 Thomas Jefferson Road
Wayne, Pa.

JUDGMENT IN A CRIMINAL CASE

Edward Schwabenland
Attorney for Defendant

THERE WAS A:

— verdict of quilty as to counts: 3, 4 & 5

— verdict of not guilty as to counts: 1 & 2

THE DEFENDANT IS CONVICTED OF THE OFFENSE OF: False statements on a tax return. 26:7206(1).

IT IS THE JUDGMENT OF THIS COURT THAT: On count 3 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 90 days. On count 4 the defendant is to pay a fine to the United States in the sum of $9,000.00. On count 5 the

Appendix C

defendant is placed on probation for a period of 3 years upon the following terms and conditions:

1. That he pay taxes deemed to be due.

2. That he perform community service for 300 hours over the period of probation as is approved by the probation office and the court.

Sentence is stayed pending appeal.

October 25, 1989

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependants, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

Appendix C

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occuring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $150.00 pursuant to Title 18, U.S.C. Section 3013 for counts 3, 4 & 5 as follows.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court an amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

Appendix C

— The Court orders commitment to the custody of the Attorney General and recommends:

No objection to community correction facility on work release.

Date of imposition of Sentence: 10/19/89

s/ Norma L. Shapiro
Signature of Judicial Officer

Norma L. Shapiro, J.
Name and Title of Judicial Officer

(2)

No. 90-246

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES K. DORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
YOEL TOBIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the jury's verdict was inconsistent and against the weight of the evidence.
2. Whether the district court improperly allowed the government to argue that petitioner's church was a sham.
3. Whether the district court properly denied petitioner's motion to dismiss the indictment on the ground of selective prosecution.
4. Whether petitioner's prosecution on one count of the indictment was barred by the statute of limitations.
5. Whether one of the statutes governing the availability of a charitable deduction on an individual tax return is unconstitutionally vague.
6. Whether testimony from an IRS agent concerning petitioner's failure to produce records constituted reversible error even though the court struck the testimony from the evidence at trial.
7. Whether the district court erred in charging the jury that statements made in petitioner's amended tax returns were material as a matter of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-246

JAMES K. DORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3a-5a) is unpublished, but the judgment is noted at 902 F.2d 1567 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-5a) was entered on April 10, 1990. A petition for rehearing was denied on May 7, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 6, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of willfully making false statements on amended joint income tax returns filed for the 1981, 1982, and 1983 calendar years, in violation of 26 U.S.C. 7206(1). C.A. App. 9a, 14a-16a. He was acquitted of willfully making false statements on the original 1982 and 1983 income tax returns, and his wife was acquitted on all counts. Govt. C.A. Br. 6, 8; C.A. App. 9a. Petitioner was sentenced to 90 days' imprisonment, three years' probation, and a $9,000 fine. Pet. App. 6a-7a.

1. Petitioner and his wife filed joint income tax returns for the years 1979 through 1983. C.A. App. 175a-177a. They also filed amended returns for 1981, 1982, and 1983, which claimed charitable contributions to the Universal Life Church (ULC) in the amounts of $14,034, $11,400, and $11,050, respectively. C.A. App. 14a, 15a, 16a, 185a-189a, 191a-198a. The claimed contributions resulted in substantial reductions of the Dorrises' tax liability. C.A. App. 377a-379a. Each return included a written declaration that it was made under penalties of perjury. C.A. App. 181a-182a. Petitioner admitted that he had prepared the tax returns. C.A. App. 531a.

Other than minor processing fees paid to ULC headquarters, all of the funds claimed as contributions were deposited into the bank accounts of a ULC branch church that the Dorrises established in their home. C.A. App. 277a-278a, 362a-364a. The Dorrises controlled the church bank accounts, and they used money in the accounts to pay their personal expenses. C.A. App. 320a-340a, 343a-346a, 359a-361a, 366a-372a.[1] Petitioner admitted

[1] Petitioner and his wife served as two of the church's three board members; the board was operated by majority rule. C.A. App. 542a,

that he had asked his wife to sign checks on the church accounts. C.A. App. 533a.

Petitioner, who became a "minister" in the Universal Life Church after paying a $25 fee to ULC headquarters, was the "pastor" of his local church, while his wife served as treasurer. C.A. App. 277a, 287a-288a. Although petitioner claimed that all members of ULC churches everywhere were members of his church, the only members of his local church that he identified were himself, his wife, and those who served as the third member of the church's board. C.A. App. 540a-541a. Petitioner and his wife joined a local Catholic church during the period in which they belonged to the ULC. C.A. App. 266a-267a; 270a.

Kenneth Morris was one of a number of individuals who served for a period of time as the third board member. He testified, however, that he never attended any board meetings or church services. C.A. App. 217a-218a. Morris had established his own branch of the Universal Life Church, and he and petitioner engaged in "check swapping" by exchanging checks totalling $1,000 to each other's church so that they could document contributions for tax purposes. C.A. App. 221a-224a.

Although the national Universal Life Church in Modesto, California, was granted status as a tax exempt organization in 1974, its tax exemption was revoked retroactively in 1984. None of the churches operated by the Dorrises in their various residences was ever declared tax exempt. C.A. App. 238a-239a.

2. On appeal, petitioner raised ten claims of error. Pet. App. 3a-4a. After considering those contentions, the court of appeals affirmed the judgment of the district court without opinion.

545a. A board resolution gave petitioner and his wife the power to sign checks on the church's account. C.A. App. 544a-545a.

ARGUMENT

1. Petitioner first contends (Pet. 8-12) that the jury's verdict was inconsistent and against the weight of the evidence. His argument is meritless.

a. Petitioner argues that, because he claimed the same charitable contributions on both the original and amended 1982 and 1983 returns, the jury's verdicts that he was not guilty of filing false original returns but was guilty of filing false amended returns are inconsistent. Even if petitioner were correct that the verdicts are inconsistent, he would not be entitled to relief. It is well settled that a defendant cannot attack a jury verdict of guilty on one count because it appears to be inconsistent with an acquittal on another count. *United States* v. *Powell*, 469 U.S. 57 (1984); *Dunn* v. *United States*, 284 U.S. 390 (1932). In any event, there is no inconsistency.

Petitioner filed the amended returns after he was interviewed in the summer of 1984 by two IRS special agents. At the interview, he was advised that a criminal investigation was being conducted. C.A. App. 275a-277a. In response to questions, petitioner falsely asserted that the contributions he claimed on his returns had been made to ULC headquarters in Modesto, California. C.A. App. 279a. The jury could have believed that petitioner had not acted willfully in filing the false original returns, but that his awareness of the criminal investigation and his act of lying to IRS agents established that he did act willfully in filing the false amended returns. See *United States* v. *Walsh*, 627 F.2d 88, 92 (7th Cir. 1980).

b. Petitioner also contends that the evidence was insufficient to convict him. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." *United States* v. *Powell*, 469 U.S. at 67.

The evidence against petitioner was clearly sufficient. The elements of filing a false return under 26 U.S.C. 7206(1) are: (1) the defendant made and subscribed a return that was incorrect as to a material matter; (2) the return contained a written declaration that it was made under penalty of perjury; (3) the defendant did not believe the return to be true and correct as to every material matter; and (4) the defendant falsely subscribed the return willfully. See *United States* v. *Marabelles*, 724 F.2d 1374, 1380 (9th Cir. 1984). Of the four elements, petitioner does not dispute that the second element was satisfied.

The evidence showed that the returns at issue were materially incorrect. The law is clear that a person may not claim a charitable deduction for a gift over which he retains control (see *Hansen* v. *Commissioner*, 820 F.2d 1464, 1468 (9th Cir. 1987)), and there was substantial evidence that petitioner and his wife controlled the accounts of the church to which they "contributed." Moreover, the claimed charitable deductions affected the computation of the Dorrises' tax liability. See *United States* v. *Graham*, 758 F.2d 879, 886 n.5 (3d Cir.), cert. denied, 474 U.S. 901 (1985). Therefore, petitioners' returns were incorrect as to a material matter.

The government also proved that petitioner knew that the returns were false. Except for minor processing fees, the "contributions" on which the deductions were based had been made to the branch church established and controlled by petitioner and his wife, and the money had been used to pay the family's personal expenses. This evidence, coupled with evidence that petitioner asked his wife to sign checks to and from the church account, was more than sufficient to establish that he was aware that the claimed "contributions" were deposited into accounts he controlled.

Finally, there was overwhelming evidence that petitioner acted willfully when he falsely subscribed the return, *i.e.*, that he voluntarily and intentionally violated a known legal duty (see *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976)). The evidence that petitioner himself prepared the tax returns demonstrated that he was aware that the deductions at issue had been claimed. There was also ample evidence that he knew his control and personal use of supposedly contributed funds made the claimed deductions illegal. Prior to filing the amended returns, petitioner, who had a master's degree in business (C.A. App. 277a), was advised of the criminal investigation and was questioned about the charitable contributions he had previously claimed. Demonstrating his recognition of the falsity of the deductions at issue, he tried to hide the relevant facts from investigators: he falsely told two IRS special agents that the "contributions" had been made to the headquarters of the Universal Life Church in Modesto, California, and that the headquarters church had reimbursed him for his expenses. C.A. App. 279a-280a. See *United States* v. *Walsh*, 627 F.2d at 92 (false statements to IRS agent constituted proof of willfulness). Thus, the evidence established that petitioner claimed deductions to which he knew he was not entitled, in intentional violation of a known legal duty to file accurate returns.[2]

2. Petitioner argues (Pet. 12-15) that the trial court erroneously allowed the prosecutor to argue or suggest that petitioner's congregation was a sham. He contends that the prosecutor's argument was "contrary to the weight of the evidence" and violated his First Amendment rights.

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[2] The returns themselves put petitioner on notice of this duty by requiring a declaration, under penalty of perjury, that they were true and correct to the best of petitioner's belief.

Although the First Amendment does not allow the government to question the validity of particular religious beliefs, it does permit inquiry into whether the beliefs are sincerely held and whether a church has been set up by the taxpayer for tax avoidance rather than religious purposes. See *United States* v. *Daly*, 756 F.2d 1076, 1081 (5th Cir.), cert. denied, 474 U.S. 1022 (1985); *United States* v. *Peister*, 631 F.2d 658, 665 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981). See also *Mason* v. *General Brown Central School District*, 851 F.2d 47, 53 (2d Cir. 1988). Cf. *Hernandez* v. *Commissioner*, 109 S. Ct. 2136, 2146 (1989).

The prosecutor's argument in this case did not challenge the validity of petitioner's claimed religious beliefs. The prosecutor specifically told the jury that the government had no intention of attacking petitioner or his wife for any religious principles to which they may have adhered and that the government did not intend to attack the Universal Life Church or its religious doctrines. C.A. App. 158a.[3] The prosecutor's argument focused instead on the contention that petitioner's church served as a vehicle for petitioner and his wife to generate checks to support improper charitable contributions. C.A. App. 157a-158a, 672a. Because that argument did not implicate any First Amendment concerns, petitioner's claim of error is meritless.

3. Petitioner claims (Pet. 15-19) that the trial court erred in denying, without an evidentiary hearing, his motion to dismiss the indictment on the basis of selective prosecution.

To prevail on a selective prosecution claim, a defendant must show that the government was motivated by a dis-

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[3] The trial court charged the jury that the "dogma or * * * practices" of the Universal Life Church were not at issue in the case. C.A. App. 749a.

criminatory purpose and that its actions had a discriminatory effect. *Wayte* v. *United States,* 470 U.S. 598, 608 (1985). He must demonstrate both that he has been "singled out" while similarly situated persons have not been prosecuted, and that the decision to prosecute him was made on the basis of such impermissible considerations as race or religion. *United States* v. *Greenwood,* 796 F.2d 49, 52 (4th Cir. 1986); *Virgin Islands* v. *Harrigan,* 791 F.2d 34, 36 (3d Cir. 1986). To obtain an evidentiary hearing, petitioner was required to allege some facts tending to show that he was selectively prosecuted and raising a reasonable doubt about the prosecution's purpose. *United States* v. *Bassford,* 812 F.2d 16, 19 (1st Cir.), cert. denied, 481 U.S. 1022 (1987).

Petitioner asserts that the fact that "[n]umerous tax payers have been assessed civil tax liabilities based upon their alleged contributions to the Universal Life Church" establishes that "others who were similarly situated as the Dorris family have not been * * * prosecuted for the same conduct." Pet. 18. Yet proof that the government has not prosecuted others who have contributed to petitioner's religion logically cannot support a conclusion that the government is discriminating against adherents of that religion. Moreover, in light of the flagrancy of petitioner's conduct and the strong evidence of willfulness, it was entirely reasonable for the government to proceed criminally, rather than civilly, in this case. Petitioner's allegation is therefore insufficient to support a selective prosecution claim.

Petitioner's assertion that numerous members of the ULC have been the subjects of IRS enforcement actions does not give rise to an inference that members of that church have been improperly targeted. The government is not forbidden to examine closely the returns of individuals who deduct charitable contributions to an organization

like the ULC. See *Mason* v. *General Brown Central School District*, 851 F.2d at 52-53. At the very least, a prerequisite to a selective prosecution claim would have to be evidence that the government does not investigate or prosecute individuals who fraudulently deduct contributions to other churches. Yet petitioner does not present any such evidence.[4]

4. Petitioner argues (Pet. 19-20) that Count 3 of the indictment, which charged him with making and subscribing a false amended return for the 1981 calendar year, was barred by the statute of limitations. The limitations period with respect to Section 7206(1) is six years. 26 U.S.C. 6531(5). The amended return for 1981 was filed on January 8, 1985 (C.A. App. 188a-189a). The indictment was filed on March 21, 1989,[5] slightly over four years after the date of filing of the return and thus well within the limitations period. See *United States* v. *Samara*, 643 F.2d 701, 704 (10th Cir.), cert. denied, 454 U.S. 829 (1981).

Petitioner contends, however, that the limitations period ran from the due date of his original return for 1981, rather than the date on which he filed the amended return, because the same charitable deductions were claimed in both returns. That is clearly incorrect. Section 7206(1) proscribes "willfully mak[ing] and subscrib[ing]

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[4] Petitioner also asserts (Pet. 18) that his prosecution for making false contributions to the ULC on his tax returns for 1981, 1982, and 1983 "constitutes, in essence, a form of retroactive prosecution" (Pet. 18), since the Internal Revenue Service first revoked the tax exempt status of the parent ULC church in August 1984. The tax status of the parent church, however, was not relevant to this prosecution, which involved only "contributions" to the church located in petitioner's own home.

[5] A superseding indictment correcting minor typograghical errors was filed on August 22, 1989. Gov't C.A. Br. 6; C.A. App. 2a, 3a.

any return, statement, or other document" that the taxpayer "does not believe to be true and correct as to every material matter." The amended return constituted a "return * * * or other document" separate from the original return. Therefore, a new violation occurred when the amended return was filed. The fact that the new violation consisted of the repetition of an earlier false statement is immaterial. See *United States* v. *Samara,* 643 F.2d at 704.

5. Petitioner claims (Pet. 20-21) that 26 U.S.C. 170, the provision governing the deductibility of his claimed charitable contributions, is unconstitutionally vague. Petitioner's argument centers around the definition of "charitable contribution" in 26 U.S.C. 170(c). That subsection, in relevant part, defines a "charitable contribution" as

> a contribution or gift to or for the use of * * * (2) A corporation, trust, or community chest, fund, or foundation * * * (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *.

Petitioner argues that the phrase "net earnings" is too vague to support a criminal conviction.

The plain terms of Section 170 put petitioner on notice that he could not deduct as charitable contributions payments that went into accounts he controlled and were ultimately used to fund his personal expenses. Insofar as the terms of the statute require explication on this point, courts have long held, with respect to the provision of 26 U.S.C. 501(c)(3) employing the same terms, that "a member's ready use of the religious organization's funds for personal use * * * violates the inurement requirement."

United States v. *Daly*, 756 F.2d at 1083. Accord *Hall* v. *Commissioner*, 729 F.2d 632, 634 (9th Cir. 1984); *Founding Church of Scientology* v. *United States*, 412 F.2d 1197, 1202 (Ct. Cl. 1969), cert. denied, 397 U.S. 1009 (1970). See also *Smith* v. *Commissioner*, 800 F.2d 930, 934 n.2 (9th Cir. 1986).

Even without regard to the "inurement" requirement, petitioner's "contributions" were not deductible. Since petitioner and his wife retained control over the purported donations, those donations did not constitute "contributions" or "gifts" under the statute. See *Hansen* v. *Commissioner*, 820 F.2d 1464, 1468 (9th Cir. 1987); *Pollard* v. *Commissioner*, 786 F.2d 1063, 1067 (11th Cir. 1986). Cf. *Davis* v. *United States*, 110 S. Ct. 2014 (1990). In addition, contributions are deductible only if made to a recipient "organized and operated exclusively for religious * * * purposes." 26 U.S.C. 170(c)(2)(B). The evidence in this case established that a primary purpose behind petitioner's church was to generate tax benefits for petitioner. Notwithstanding petitioner's contention (Pet. 21) that the Code does not define the term "religious purposes," the generation of tax benefits clearly does not qualify as a "religious purpose." See *Hansen* v. *Commissioner*, 820 F.2d at 1468.

6. Petitioner claims (Pet. 21-22) that the prosecutor's questioning of IRS Special Agent Jack Bell concerning whether Bell ever received church records requested from petitioner constituted reversible error.

Agent Bell testified that he asked petitioner about his church records during a July 1984 interview and that petitioner described those records. C.A. App. 275a, 281a-282a. Agent Bell further testified that he requested the records. C.A. App. 282a. Bell was then asked whether he had ever received any of the records, and he replied that he had not. *Ibid.* Petitioner's counsel objected at sidebar to the question and answer. *Ibid.* The court struck them

and, at petitioner's request (C.A. App. 283a), told the jury to disregard them. C.A. App. 286a-287a.[6] Although petitioner did not move for a mistrial, the court stated that none would be granted. C.A. App. 285a.

Relying on *Doyle* v. *Ohio,* 426 U.S. 610 (1976), petitioner asserts that the stricken question and answer were "in violation of Petitioner's Fifth Amendment right and required a reversal of the conviction." Pet. 22. Petitioner's assertion lacks merit. In *Doyle,* 426 U.S. at 619, the Court held that it violated the Due Process Clause for the prosecutor to make use of a defendant's silence at the time of arrest after receiving *Miranda* warnings. Later cases indicate that *Doyle* rests on the fundamental unfairness of using a suspect's silence against him after he has been implicitly assured by *Miranda* warnings that it will not be so used. *Greer* v. *Miller,* 483 U.S. 756, 763 (1987).

There was no *Doyle* violation in this case. This Court in *Greer* noted that the Due Process Clause merely bars "*the use*" of a defendant's post arrest silence. 483 U.S. at 763 (quoting *Doyle* v. *Ohio,* 426 U.S. at 619) (emphasis in *Greer*)). Here, the trial court struck the question and answer at issue and clearly instructed the jury to disregard them. The fact that Agent Bell requested and did not receive the records "was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no *Doyle* violation occurred in this

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[6] The court told the jury:

> although it's been some time since the last question was asked and answered, I'm asking you, if you remember it, to disregard it. The question should not have been asked and * * * there shouldn't have been an answer either. So that the question and the answer are stricken. The defendant had no obligation to produce records for the agent on request. Therefore, you should draw no inference from the fact that the records were requested or that they were not produced. C.A. App. 286a-287a.

case." *Greer,* 483 U.S. at 764-765. See also *United States* v. *Lane,* 883 F.2d 1484, 1493-1495 (10th Cir. 1989), cert. denied, 110 S. Ct. 872 (1990).

7. Finally, petitioner contends (Pet. 22) that the trial court erred in instructing the jury that the charitable contributions claimed in petitioner's amended returns were material as a matter of law.

The courts of appeals that have addressed the question have all agreed that the materiality of a false statement on a tax return is a question of law for the judge to decide. See *United States* v. *Fawaz,* 881 F.2d 259, 261-262 (6th Cir. 1989) (citing cases from the First, Second, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits). The improper charitable deductions that petitioner claimed on his returns affected the computation of his tax liability. C.A. App. 377a-379a. The claimed deductions were therefore material as a matter of law, see *United States* v. *Graham,* 758 F.2d at 886 n.5, regardless of whether they had also appeared on petitioner's original returns.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990